LOS ANGELES BAR BULLETIN

In This Issue

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Los Angeles
BAR BULLETIN

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VOL. 29 OCTOBER, 1953 No. 1

PRESIDENT'S PAGE

By W. I. Gilbert, Jr.

President, Los Angeles Bar Association

W. I. Gilbert, Jr.

Preliminary plans for the County's proposed $17,500,000 six-story courthouse were approved last month by the Board of Supervisors, just twenty years after the old red courthouse was doomed to demolition because of earthquake damage.

Great credit must go to our own "New Courthouse Committee" for its diligent efforts to keep interest stimulated in the need for an adequate, functional building. For a job well done, the Board of Trustees congratulates Committee Chairman Emmett E. Doherty and his colleagues, Senior Vice President Harold A. Black, T. B. Cosgrove, Henry Duque, Dana Latham and Herman F. Selvin.

Thanks to the committee's cooperation with the Supervisors, citizens and taxpayer groups, and Superior and Municipal Court judges, work on the new courthouse is set to begin November 1st and to be completed in July, 1956.

Appreciative of the Bar Association's continued interest, John Anson Ford, Chairman, County Board of Supervisors, declared:

"The patient but firm persistence on the part of the Los Angeles County Bar Association that a new courthouse must be built has

aided materially in bringing to a happy conclusion the long, drawn-out negotiations for an adequate structure.

"While there were differences among the Supervisors as to the most suitable location, the Bar Association has helped to focus attention on the imperative necessity of reaching a final decision even though it involved some compromise.

"Personally, I feel we are going to have a splendid and fully adequate building without extravagance and in a location that will add convenience, symmetry and beauty to the Civic Center.

"In all of the relationships between the Bar Association and the Board of Supervisors, Mr. Emmett Doherty has displayed tact and patience but has worked unceasingly toward a final solution."

The Association's Committee has been active especially since the administration of President Paul Nourse when "Pat" Doherty accepted the Chairmanship and started the ball rolling with petitions and resolutions to all involved.

Much credit must go to the Citizens' Courthouse Committee (headed by civic leaders Asa Call and Hayden F. Jones) which presented the preliminary plans with approval for the site.

And the Board of Supervisors is to be congratulated for selecting a final site to make our dream of a courthouse become a reality.

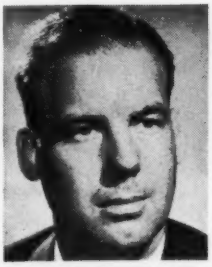
The approved structure will house sixty-five of the County's eighty Superior Court judges and thirty-two of Los Angeles' forty-two Municipal Court judges. Ten Municipal judges and fifteen Superior judges not housed in the new building will be assigned to criminal courts which will be continued in the Hall of Justice near the County Jail. Other judges will be assigned in outlying areas.

Already the County has in its treasury all but $2,500,000 of the total building cost, which will be raised by direct taxation and not by a bond issue.

All in all, the County Bar Association is most appreciative to all the interested groups which have helped in the realization of plans for a new courthouse and which is for the convenience of the general public, judges, lawyers, clients and witnesses.

Criminal Practice in the Municipal Court

By Evelle J. Younger*



Evelle J. Younger

After an attorney hangs out his shingle, he may practice for years before he forms a corporation, dissolves a partnership, contests a will or handles a felony case. Within a very few weeks, however, he probably will represent a client who has been charged with a misdemeanor. It is a matter of simple arithmetic. Last year, for example, in the City of Los Angeles, there were 337,341 misdemeanor complaints (not including traffic citations) filed in the Municipal Court by the City Attorney's office, or approximately 67 "cases" for each attorney in the city.

It would appear, therefore, that lawyers, particularly Junior Barristers and their senior associates who have had only civil experience, should receive some enlightened and practical advice on the subject of "Criminal Practice in the Municipal Court." The realization that professional writers and lecturers have unfortunately devoted only very little —and very lofty — attention to the subject, prompted this effort. This will not be a profound or complicated legal discourse; but some relevant do's-and-don'ts are set forth below on the assumption that all can be easily understood and remembered, and with the hope that some may prove helpful.

DON'T UNDERESTIMATE THE PROBLEMS INVOLVED.

There are, in our City and County Jails at the present time, clients of some of our very best lawyers. A prominent and successful attorney, particularly one who takes great pride in pointing out that he specializes in *civil* law, often cannot quite bring himself to prepare his case when he is called upon to represent a client charged with a misdemeanor. Uninformed, though brilliant and successful, civil lawyers are responsible for more unexpected incarcerations than are less able lawyers who just play by ear in the court room.

*Of the Los Angeles Bar; formerly Deputy City Attorney of Los Angeles and Pasadena City Prosecutor; now associated with the firm of Guthrie, Darling & Shattuck.

Ordinarily a general practitioner will not hesitate to seek advice from an associate in a specialized field in which he has had little experience (*i. e.*, taxation, personal injury). The same lawyer, however, often is reluctant to seek advice when he is about to appear in Municipal Court on behalf of a client charged with a criminal offense. He may have successfully evaded this type of "business" for several years; and only now, when one of his best clients becomes involved with the gendarmes, does he find it necessary to appear in a *criminal* court. He will not concede that the situation presents a professional challenge or that there are any mysteries involved in so far as he is concerned. He promptly proceeds to do everything wrong, albeit in a most impressive fashion.

For example: Our old friend John Doe was recently involved in a serious automobile accident. As a result he was sued for $150,000 and also charged with a violation of Section 510, California Vehicle Code (speeding). His attorney was able and experienced in civil matters and knew, without extensive research, that his client should not plead guilty in the criminal case, although he was in fact guilty, since that would adversely and seriously affect his civil case. Consequently, the attorney demanded a jury trial. In the course of the trial he put his client on the stand. His client blew sky-high and provided the plaintiff in the civil case with a beautiful deposition. Plaintiff's attorney was watching the proceedings in the "criminal" case from the back row of the court room, with a wide smile on his face. The jury found the defendant guilty and the judge, impatient because of the wasteful and futile trial, imposed a substantial fine. It is doubtful that Doe's attorney ever worked himself out of the hole in the civil case. Almost anyone who handles matters of this sort could have told the defendant's attorney that he should have "submitted" the case to the court on the investigating officer's report. This is a device used by lawyers when they don't want to go to trial but can't afford to plead guilty. Most serious automobile accidents are investigated by police officers and a comprehensive report written. At the request of the defense counsel and with the permission of the prosecutor, the judge will ordinarily "try" a defendant on the basis of information contained in that report. His decision constitutes a finding — not a plea — so the defendant is protected in so far as any civil action is concerned. The "trial" usually takes only about five minutes. The

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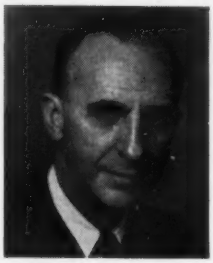
Partnership Liability of Corporate Officers and Organizers

By Raymond Tremaine*



Raymond Tremaine

MOST of us have advised clients that a major reason for incorporating a business is the avoidance of individual liability. Your Corporation Committee has requested me to write this article to wave the red flag of warning of an exception known to few lawyers.

The repeal of Article XII, Section 3, of the California Constitution followed by the repeal of Section 322 of the Civil Code were generally believed to limit the liability of shareholders to a subscription liability, fraud in the issuance of shares, assessments on shares, and specific provision for liability in articles of incorporation.

It is generally believed that directors have no liability contractually to creditors of a corporation for corporate debts (6a Cal. Jur., pg. 1206; California Corporation Code, Sec. 687).

Promoters of corporations incur various liabilities (Ballantine and Sterling, *California Corporation Laws*, pp. 92, 93, 158, 170-172, 349; also 6a Cal. Jur., *Corporations*, Chapter VI), but the liabilities contemplated are of a type not expected to arise after incorporation.

The above assumptions overlook the decision in *Geisenhoff vs. Mabrey*, 58 Cal. App. 2d 481, 137 Pac. 2d 36, decided by Division One of the First District Court of Appeal on May 3, 1943, followed by no petition for rehearing or petition for hearing in the California Supreme Court. The case has been cited a number of times, but never (through Shepard's May 1953 issue) on the question of liability which is here our concern.

In the case of *Geisenhoff vs. Mabrey, (supra)* plaintiff obtained judgment in the Trial Court for the reasonable value of services of a promotional nature rendered by him in connection with a project of constructing and operating an ice skating rink in San Jose. Judgment went against Ice Bowl, Inc., a corporation, and against

*Of the Los Angeles Bar.

the defendants Mabrey, Hollenbeck, Streeter and Schwab. The individual defendants were directors and officers of the corporation. No stock in the corporation was ever issued. The defendants were the beneficial owners of the corporation's property. The Trial Court found that the individual defendants operated the skating rink "as their individual enterprise and as a joint venture among themselves," but "under the name of said corporation." The principal question involved in the case was the liability of the individual defendants. The defendants appealed from the judgment of $3,000. In its opinion, the Court stated on pages 489, 490 and 491 as follows:

> "If as held by the trial court, the defendants were conducting the business as 'their individual enterprise and as a joint venture,' but 'under the name of said corporation,' then the individual liability of Hollenbeck, Schwab and Streeter for the reasonable value of plaintiff's services performed before they became associated with the enterprise is governed by section 2411, Civil Code, as follows: 'A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.' (See, also, sec. 2435, Civ. Code.) The joint venture, if one exists, is, on the facts of this case, a partnership as regards section 2411.
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> * * *
>
> "The liability of the individual defendants for debts arising *after* their association with the business is governed by the usual rule that partners are liable for partnership debts without restriction of satisfaction to partnership property, subject to the rules for marshaling assets.
>
> "We are of the view that the trial court's finding that the individual defendants conducted the rink business 'as their individual enterprise and as a joint venture among themselves' under the name of the corporation is supported by the record. We have adverted to the fact that no stock in the corporation was ever issued. The corporation came into existence on March 6, 1940, with the filing of its articles of incorporation. We do not hold that the issuance of stock is a requisite to corporate existence, or in all cases to freedom from individual liability. (See note, 50 A.L.R. 1030.) But in the case herein the evidence shows that, although a permit for the sale and issuance of stock was granted on March 30, 1940, no stock had been issued at the time of trial in December, 1941. It ap-

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Survey to be Made of the Administration of Justice in Los Angeles

By Frederick G. Dutton

How, and how well, the trial courts of metropolitan Los Angeles operate: that is the target of a three-year study recently announced by Francis H. Lindley, President of the Haynes Foundation.

The inquiry will be financed by a $77,000 grant from the Foundation and is sponsored by the American Bar Association as a part of a nation-wide survey of metropolitan trial court systems. The Los Angeles study will be directed by Professor James G. Holbrook of the University of Southern California Law School.

The probe is to start immediately. It will be primarily definitive at its outset, seeking to stake out the jurisdiction and organization of courts in this area; qualifications and selection of judges and jurors; types and costs of litigation; the machinery for handling calendars, and disposition of case loads; and relationships among courts, departments of courts and other agencies. The study will also inquire into the attorneys' role in judicial administration and the extent to which the bar and judiciary cooperate in meeting their respective problems.

The results of the inquiry will ultimately be evaluated and recommendations made in a report to be published at the conclusion of the program. Particular attention is to be given to the characteristics of judicial administration peculiar to a metropolitan area and what can be done to meet the special legal problems incident to urban conditions. In this connection, rotation versus specialization of judges, the need for branch courts and the causes of "logjamming" or "bottlenecks" in the flow of litigation are among the subjects to be reviewed.

Although not included in the study's outline of contemplated work, it would seem that certainly another local problem relevant to the project and in need of investigation is the extreme variation among Los Angeles judges in their readiness to issue writs of habeas corpus, as suggested by the Governor's Final Crime Commission Report issued in May of this year. Few subjects to be considered by the project could show how varying justice is, depending on which of the area's many judges is hearing the matter, or how

closely a question of judicial administration can be tied to an important community problem, in this case crime.

The entire study will be undertaken by a research staff of from two to four lawyers under the direction of Professor Holbrook. With thoroughly practical objectives in mind, it is planned that the major part of the project will be taken up with observation of day-to-day operations of the courts and other judicial machinery in order to survey law in practice, as distinguished from that in the books. The research group hopes to work closely with both judges and attorneys to gather a full and frank statement of the facts underlying the transaction of judicial business in this area.

In order to assure that the study will be objective, the American Bar Association requires that it be conducted under the sponsorship of a law school accredited by the ABA. The Los Angeles project will be sponsored by the University of Southern California Law School. The deans of the law schools of the University of California at Los Angeles, Loyola University and the University of Southern California have designated James H. Chadbourn, S. V. O. Prichard and Stanley Howell, respectively, to serve as consultants for the project.

An advisory committee of local judges, lawyers, and laymen will guide the Los Angeles survey. Paul Fussell, Vice President of the Haynes Foundation, is chairman of the advisory committee; and Judge Philbrick McCoy of the Superior Court, a member of the American Bar Association Committee on Judicial Administration in Metropolitan Trial Courts, is vice chairman. Judicial members of the committee also include W. Turney Fox, Justice of the District Court of Appeal, who was formerly Presiding Judge of the Superior Court and a member of the Judiciary Council; Phillip H. Richards, Presiding Judge of the Superior Court; Clarence L. Kincaid, Superior Court Judge, former Presiding Judge of such court and a present member of the Judiciary Council; and James H. Pope, Judge of the Municipal Court, formerly Presiding Judge of that court and chairman of the Conference of California Judges.

In addition, the advisory committee includes Homer D. Crotty, past president of the State Bar of California and member of the Institute of Judicial Administration; John Despol, secretary-treasurer, State Council, C. I. O.; Stevens Fargo, past president

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Announcement

Leon B. Brown, Chairman of the Committee on Continuing Education of the Bar, has announced that the State Bar of California will sponsor, in conjunction with the Los Angeles Bar Association, the fall program on "Medical Aspects of Personal Injury Litigation" and "Review of 1953 Legislative Changes to the Practice Codes."

The fall series will be held in the Assembly Hall of the State Building, beginning on November 3, 1953, at 7:15 p.m. and continue for six successive Tuesday evenings. The opening lecture will be a panel discussion of the changes and amendments made to the Civil Code, Code of Civil Procedure, and Probate Code by the 1953 California Legislature. The next five lectures will be: Injuries to Bones and Joints; Injuries to Organs; The Psychological Aspects of Personal Injuries; Preparation of the Medical Expert; Presentation of Medical Testimony—Direct and Cross-Examination.

A specially illustrated and written syllabus has been prepared by outstanding doctors and lawyers. In addition, a "Summary of Selected 1953 Legislation" prepared by the California Land Title Association will be distributed to all registering attorneys.

TAXATION REMINDER

By the Committee on Taxation of the Los Angeles Bar
(This is another in the Series of Brief Statements intended as tax refresher notes for the assistance of lawyers in general practice.)

TAX PROBLEMS INCIDENT TO PATENT TRANSACTIONS

Whenever there is a sale or license of patent rights, two sets of problems arise, one of which relates to the transferor, and the other to the transferee.

Transferor's Problems

Usually the issue with respect to the transferor is whether his profit from the transaction constitutes a gain from the sale of an asset or whether it constitutes royalty income received as compensation for a license. The problem assumes importance from the fact that if the transfer amounts to a sale, then the profit constitutes a gain from the sale of an asset, and if such asset qualifies as a capital asset under the provisions of Section 117 of the Internal Revenue Code, and if such asset has been held by the seller for the requisite period, then the profit is subject to the long term capital gain tax. On the other hand, if the transaction is a license, then the licensor's profit is royalty income, and, therefore, subject to the taxes and surtaxes upon ordinary income.

Whether or not such a transaction is a sale or a license depends not upon the terminology employed in the documents, or upon the form of the documents, or necessarily upon the intention of the parties, but upon the substance of the transaction.

Under the principles established by a decisive majority of the cases, if the transfer is sufficiently complete to be a sale, the presence of percentage compensation provisions (provisions for compensation measured by sales, profits, or production) will not render the transfer a license. Notwithstanding the court decisions, however, the Bureau continues to contend otherwise. Its position is set forth in Mimeograph 6490, P-H Fed. Tax Service, Par. 5705, CCH Fed. Tax Service, Par. 69.056.

The transfer of less than all these exclusive rights, namely, the rights to make, use, and sell, is generally if not invariably held to be a license and not a sale. Even the transfer of all of these rights

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CRIMINAL PRACTICE IN THE MUNICIPAL COURT

(Continued from page 4)

court recognizes the reasons for the submission and, having in mind that defendant has saved the taxpayers a good deal of time and money, ordinarily imposes a nominal fine — sometimes even a suspended sentence.

The fact that the consequences of a mistake in a misdemeanor case are ordinarily not considered to be extremely serious by most attorneys probably accounts for the lack of interest and poor preparation in such cases. True, a client charged with a misdemeanor will not go to the penitentiary. On the other hand, and strange though it may seem, the typical defendant doesn't like to go to jail even for 30 days. As a matter of fact, in Los Angeles at the present time, due to the crowded condition in the County Jail, some would prefer a year in the penitentiary to six months in the County Jail.

BE CONSIDERATE OF THE JUDGE, PROSECUTOR AND CLERK

Courtesy always pays dividends. This is particularly true in a Criminal Division of the Municipal Court. Ordinarily when an attorney handles ten civil litigated matters, he will have a different opponent in each instance. In Los Angeles, if he has ten criminal cases in the Municipal Court, his opponent in each case will be a representative of the City Attorney's office. They have a *most* effective grapevine. Give one deputy a cause for criticism or complaint at 11:00 A.M. and every other deputy and every court attache in the city will hear about it by noon. A lawyer is not likely to do anything unfair or dishonest. He might be inconsiderate, however, and that is almost as bad.

On the other hand, he can do many things to win friends and influence people in the court room. For example, if he plans to "cop out" (change his plea to guilty) on the date set for trial, he can let the clerk or the prosecutor know sufficiently in advance so that witnesses may be excused. Similarly, if he plans to go to trial but intends to waive a jury at the last moment, he should give advance notice, particularly in courts in outlying areas where jurors are not available at all times. If he intends to request a continuance, he should do so in advance of the trial date, again demonstrating consideration for the witnesses, the court, the prosecutor's office and the taxpayers.

Don't ever be stupid enough to "threaten" the prosecutor. Recently, in the course of preparing for a trial, the City Prosecutor of one of our nearby cities determined that there was insufficient evidence to justify prosecution and decided to move for a dismissal under Penal Code, Sec. 1385. Approximately five days before the trial date, the prosecutor accidently met the defense counsel on the street. Before the prosecutor could inform the defense counsel of his plan to dismiss, the defense counsel proceeded to threaten him with all sorts of horrible consequences if he persisted in going to trial, and ended by saying that if the prosecutor wanted to be a boy scout or a "prosecutor" and was determined to try the case, that he, the defense lawyer, who had taught many an upstart a lesson in the past, would make the youthful prosecutor wish he had never passed the Bar, etc., etc. After that tirade the prosecutor could not under any circumstances dismiss the case. Fortunately, the client somehow learned that his attorney had made a complete fool of himself, and secured a different lawyer. The case was promptly dismissed.

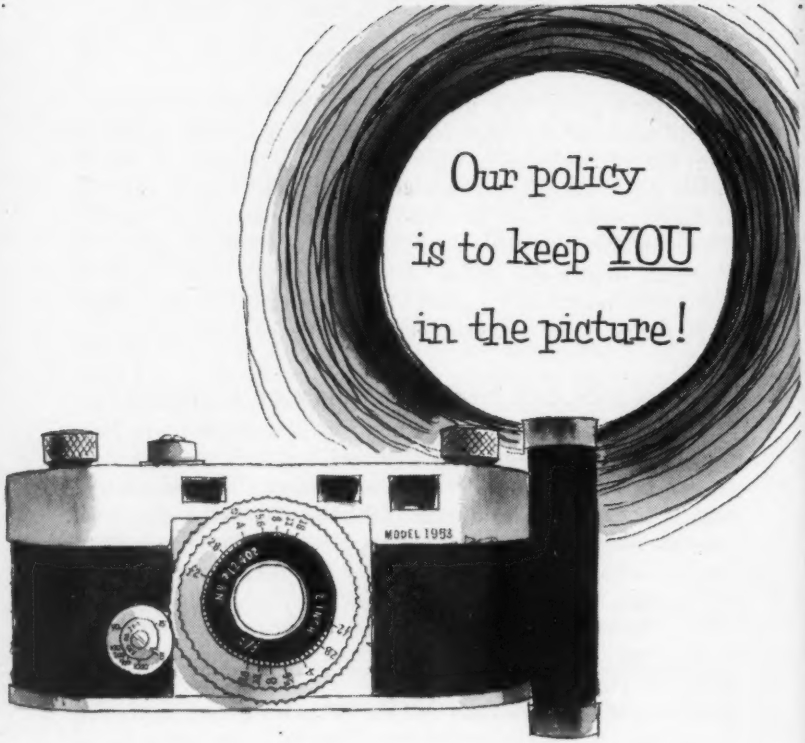
Treat the court clerk as you would another lawyer. He can be your best friend or your worst enemy. He knows a great deal

Issue Editor — E. Talbot Callister

about what is going on in the court room. Most judges frequently seek the advice of other clerks, so why should an attorney hesitate? Court attaches are happy to be of service whenever they can. Most of them enjoy doing favors, particularly for "new" lawyers. If you are inexperienced, don't be afraid to admit it and don't make it difficult for someone to help you. Make it easy for those with more experience to give you advice. A young attorney seldom gets in trouble in a court room because he knows too little. Lawyers often get in trouble, however, because they know too much.

ALWAYS EXPLORE THE POSSIBILITY OF A DISMISSAL

It is often possible to obtain a dismissal of a complaint in Municipal Court. In many cases a dismissal is entirely proper and is the best possible solution from all standpoints. This, of course, would not be true in a felony case. Likewise, though the offense be a misdemeanor, if it involves a serious moral deficiency, dangerous conduct, or violence (i. e., petty theft, indecent exposure, or reckless driving), the court will not consider a dismissal. In many situations, however, these things are not involved. There are hundreds of regulations relating to such matters as zoning, health and safety, fire prevention, labor, and building. In so far as these laws are concerned, the prosecutor and the court want compliance, not convictions. If compliance is secured, as in a case involving a zoning violation, the court often will impose either a nominal or suspended sentence, or may even dismiss the complaint "in furtherance of justice" under Penal Code Section 1385. Often in some of the outlying communities the prosecutor will join in a defense counsel's motion to dismiss a case of this sort. In Los Angeles the City Attorney's office probably will not join in the motion to dismiss; but probably will not oppose the motion. If your client is charged with "failure to provide," a dismissal is always possible, particularly in communities outside of metropolitan Los Angeles. However, if you contemplate making a motion to dismiss, you should first ask for a long continuance in order to give your client an opportunity to demonstrate his good faith and determination to support his children. It is not essential that you get a commitment in advance that the case will be dismissed *if* your client conducts himself in a commendable fashion. Assume that if he does so your chances of securing a dismissal will be good. Don't let it appear that he is being good just for purposes of the motion to dismiss.



We try to relieve you of many burdensome tasks in trust and estate management, but we always keep you in the picture. That's the best way we know of pleasing your client—to give him our very best, but let him profit from your participation when problems arise with which you are familiar.

Dynamic Trust Management

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

Many attorneys do not know that a compromise under Penal Code Sections 1377-1379 is often possible. These sections provide that a misdemeanor complaint can be dismissed where the victim has a civil remedy and acknowledges full satisfaction in open court, except when the offense is committed by or upon an officer in the execution of his duties, or riotously or with an intent to commit a felony.

There is one thing better than getting a case dismissed. That is to keep it from getting filed in the first place. In Los Angeles, and in practically every other city in Southern California, the prosecutor screens cases by holding pre-trial hearings. He gets complaints by the thousands concerning noisy radios, wife-beating, offensive odors in a neighborhood, and other real or imagined impositions. Ordinarily he will set the matter down for an office hearing in an effort to settle it to the satisfaction of all concerned without the necessity of filing a criminal complaint. Usually, in such a case, the complaining witness will appear with at least ten witnesses and the defendant will come in with an equal number, everyone in the neighborhood having taken sides. Each person will get an opportunity to speak and usually will leave the hearing satisfied, thinking that the prosecutor has supported his position and that the opposition has been properly chastised. The defendant is warned against repetition and the case is closed. Everybody benefits from the procedure, including the taxpayer. An expensive, prolonged, and unnecessary trial has been prevented. The potential defendant has been saved the embarrassment and expense of bing prosecuted. The complainant gets at least temporary relief from the aggravation complained of. Inject into that picture, however, an attorney representing the defendant who comes into the prosecutor's office and says something to this effect: "You cannot compel my client to testify. You are not a judge and you have no authority to hold a hearing of this sort. If you think you have enough evidence, go ahead and file." Obviously a complaint *must* be filed in such a case. I suspect the attorney described above feels very proud of himself for having put the prosecutor in his place. I wonder how his client feels about it.

HOW TO PLEAD GUILTY

It is fairly easy to determine *when* to plead guilty. That involves a consideration of the substantive law and the evidence. Presumably by the time a person graduates from law school, he is well

informed concerning these two subjects. Unfortunately, no school teaches a person *how* to plead guilty. Every attorney should strive to become an expert in this field. Should it be your lot to represent a number of clients in a Criminal Division of the Municipal Court, you will enter pleas of guilty more often than not. The facts will justify guilty pleas in most cases, and usually, when your client is guilty, it is to his best interest to plead guilty. Therefore, unless you are unusual and always have innocent clients, or you are too stubborn to know when you hold a losing hand, you will frequently have occasion to enter a plea of guilty on behalf of a client.

In this connection you should keep in mind that in Los Angeles the City Attorney's office wins approximately 85 to 90 per cent of the criminal cases tried. If a jury is waived, the judge can generally be counted on to find out the true facts. Even the jurors are not easily fooled, particularly after they have been on the panel for a week or more. By that time they will have heard the story about the two beers so often that they will be skeptical. Furthermore, the deputy city attorney will probably have selected a convicting jury. From other trial deputies he will have learned which of the jurors are "defensive" jurors. These jurors are not kept very busy.

You must figure the odds—just as though you were playing poker. If your chances of winning are very poor, dont' let your stubbornness hurt your client. Tell him where he stands and leave the decision up to him. Don't try the case just for the exercise or just to prove what a fine job you can do in a court room. You can always make your well-prepared closing argument before your bathroom mirror. Unless you are convinced that your client is innocent, or you think you can win the case, or your client insists on it, you should not go to trial.

If you decide to plead guilty, enter the plea in the most effective and intelligent way. First find out something about the judge. A particular judge will sentence a driver to jail for striking a pedestrian in a crosswalk and causing minor injuries. Another judge, whose court room is just down the hall, views the matter in a different light. He will impose a $25 fine and suspend it. Obviously, you would be neglecting your duty to your client if you did not try to steer him into the second judge's court room. Still, there is no way you can find out about such things in a law library. If you intend to plead guilty, discuss your case with the prosecutor or court clerk. In Los Angeles you should talk to the Deputy City Attorney

in the "Master Calendar" Division. He can ordinarily give you some good advice. If the judge sitting in the Master Calendar Division at that particular time is *lenient,* and if there are five trial divisions "open" and available in the event you answer "ready" for trial, and if four of those five judges are *tough,* then you will probably change your plea to guilty in the Master Calendar Division. The judge in the Master Calendar Division is usually more lenient than the judges in trial divisions—otherwise a tremendous backlog of jury trials would develop. If the situation is reversed, wait until you are sent out of the Master Calendar Division to a trial division and then change your plea. If the judge in the Master Calendar Division is *tough* and if all the judges available in trial divisions are *tough,* you should arrange for a continuance and wait for the situation to return to normal. Ask for a continuance (as long as possible), with the understanding that the People's witnesses may be excused and that you will plead your client guilty on the date set—otherwise your request will probably not be granted.

Although there may be multiple Counts in the complaint, you will not be expected to plead guilty to all Counts. In most cases, if you plead guilty to the first Count, the prosecutor will move to dismiss the other counts. Sometimes you can plead to the lesser offense, which is usually the last Count, but at any rate you don't have to plead guilty to all counts. You probably will not change the result by securing a dismissal of one or more Counts, but your client will find some satisfaction in the fact that he was not *completely* guilty. The average client gets pleasure out of seeing his attorney secure a dismissal of Count II, simple though the process may be. Under no circumstances should you plead to more than is necessary. Up to a point the City Attorney's office will bargain with you, and it is proper that it should. The weaker its case, even assuming a conviction is probable, the the better the bargain.

Don't practice law in the judge's chambers. If you are pleading guilty and want to tell the judge something that you think will cause him to be more sympathetic with your client, tell him in open court. He will be more at ease and more likely to consider favorably your plea on behalf of your client. A judge gets quite disgusted with an attorney who always thinks he must go into chambers and let the judge in on some deep, dark secret concerning his client. Seldom does he tell the judge anything that could not be told in open court, but he does succeed in convincing the taxpayers

sitting in the court room that something "fishy" is going on. If you know the judge will do the right and honest thing in the court room, don't put him in the position where he appears to be indulging in secret maneuvers. He will definitely appreciate your saving him from such an embarrassing situation. Once in a great while you may find it necessary to go into a judge's chambers. Ask any Municipal Court Judge, however, and he will tell you that in at least nine cases out of ten the attorney who requests an audience in chambers need not do so.

Don't expect the judge to give your client the court room. Try to suggest an appropriate sentence that the judge can accept and he will more often than not impose that sentence. Don't put him on the spot. He has a responsibility to all citizens in the community. Help him to recognize and fulfill that responsibility. Give him an "out." Realize that he must impose some sentence and try to figure out what a reasonable sentence would be under the circumstances, giving your client the benefit of every possible doubt, of course.

Here is a case in point: One of the most successful plaintiff's lawyers in this area recently had occasion to represent a client charged with a violation of Section 502, California Vehicle Code ("Drunk Driving"). After a plea of guilty had been entered, the attorney proceeded to make a brilliant and impassioned plea on behalf of his client. He convinced the judge that the man was completely without funds and that he could not possibly pay a fine without depriving his wife and four children of much-needed food and clothing. Then he proceeded to convince the judge, in his most logical and irresistible manner, that it would not be proper for the judge to suspend his client's driver's license inasmuch as he needed his car in his business and a suspension would cause him to lose his job and deprive him of the means for supporting his family. Well, the judge could not fine the defendant and he could not suspend his license, so he sent him to jail. The attorney was most irritated and greatly surprised. He should not have been. He left the judge no alternative. Actually, the client could have paid a reasonable fine; but the judge was oversold. Those who frequently appeared before this judge considered it practically impossible to get a jail sentence from him. However, this lawyer proved that if you try hard enough you can succeed at anything.

If you know your client is going to go to jail and if the probabilities are that he will get 60 or 90 days, you might do him a great

deal of good by suggesting to the court that your client should serve ten days. The judge's mouth probably will drop open. You hope he will say to himself: "Now here is an attorney who is being quite reasonable; he is trying to help his client; he also realizes his client needs some discipline; he is aware of my problems and responsibilities. Yes, I agree his client should do ten days." Don't be afraid to suggest some unorthodox sentence to the court as long as it is reasonable. Recently a judge imposed a six months jail sentence on a defendant who pleaded guilty to "Drunk Driving" and suspended it on condition that the defendant be either at home or at his place of employment at all times. He was to operate under these restrictions for a year. He was to walk to work on a certain street and return on the same street. He was to eat lunch at his place of employment. From 5 o'clock Friday until 9 o'clock Monday morning, he was to stay home. The court periodically sent police officers around to the defendant's house to make certain that he was actually fulfilling the terms of his probation. The defendant had three prior convictions for the same offense. Traditional methods had done no good. There was no solution except jail. In this particular case, however, the judge worked out a sentence whereby the defendant was in effect serving his jail sentence in his home. The public was protected, since the defendant was not permitted to drive. The taxpayers were getting a break. The defendant could continue to support his eight children. The judge knew that he would be informed by the Police Department if the defendant violated the terms of his probation, and the defendant would forthwith begin his sentence.

In minor traffic matters and other violations, such as simple intoxication, the court will often permit a bail forfeiture. The clerk or prosecutor can tell you whether or not this can be done. When the court will not allow a bail forfeiture, he will sometimes allow the defendant's attorney to "submit" the matter on the police report in the absence of the defendant. The law does not require that the defendant be present. Ordinarily it is advisable for him to be present; because the court may feel that the defendant's absence reflects a lack of interest or concern on his part, and the court may feel compelled to impress the defendant by imposing a relatively severe sentence. However, it is sometimes possible and advisable to make arrangements in such a way that your client will be spared the necessity and embarrassment of coming into court to plead guilty.

PROBATION

The failure to ask for probation does not necessarily mean a severe sentence. Formal probation involves a hearing before the court following an investigation and report by a Probation Officer. In such a case, if probation is granted, the defendant is subjected to some form of discipline and supervision and ordinarily must report periodically to the Probation Officer. Such procedure involves some inconveniences and, in the event the defendant lives some distance away, some expense. Furthermore, if the judge thinks jail is indicated, he will probably grant probation, if it is requested, and impose a jail sentence as a condition of probation. Don't, therefore, ask for probation just because it is generally considered the thing to do. The court grants *summary* probation as distinguished from *formal* probation, when he suspends all or part of a defendant's sentence, on condition that the defendant get in no further trouble during the period specified.

If the offense involves moral turpitude and a heavy sentence is anticipated, and your client needs supervision and rehabilitation, then formal probation is undoubtedly indicated. On the other hand, if the offense is of a minor nature and a substantial sentence is not likely, then you can best serve your client by urging a light sentence, or, if possible, summary probation.

In one respect, probation (formal or summary) is preferable to a straight sentence, however light. Where a client's pride is involved and where he has made a mistake that is likely not to be repeated, he looks forward to having the record expunged. Section 1203.4 of the Penal Code provides that where probation is imposed and after the defendant fulfills the conditions thereof, he can appear in court and move to have his plea of conviction set aside, a plea of not guilty entered, and the case dismissed. For most purposes after such a motion has been granted, it is as though the defendant had never been charged with or convicted of the offense.

None of the above suggestions carries any money-back guarantee. Each case is different from all other cases. Each judge is different from all other judges. A judge may think one way on Monday and another way on Wednesday. The anticipated sentence for a first offense 502 will change from time to time. In this legal field, as in any other, there is no substitute for adequate preparation. Preparation for handling a Municipal Court criminal case,

in order to be *adequate,* must include research in the office of the clerk or prosecuting attorney, as well as in the library. Following this admonition, an attorney will presumably have all the answers by the time he goes to court. However, it might be well for him to *pretend* that he does not know everything so that, just in case he might start to do something wrong without knowing it, some Good Samaritan in the court room would not hesitate to offer helpful advice.

No attorney should require any further incentive for conscientious effort than the obligation he owes his client. However, those lawyers who tend to be nonchalant about a Municipal Court criminal case would do well to remember that this court is really the people's court. More people have an experience—good or bad—with the Criminal Division of the Municipal Court than with any other court except the traffic court. In Los Angeles there are 50 misdemeanor complaints filed for every one felony complaint filed. There are five misdemeanor complaints filed for every civil complaint filed in the Municipal Court, and 24 for every civil complaint filed in the Superior Court. Many persons then derive their impression of lawyers—yes, even of our entire judicial and governmental system—from what they see, hear, and sometimes think they smell, in a Criminal Division of our Municipal Court. Therefore, it behooves us all to try to make a good impression when we are in that court.

PARTNERSHIP LIABILITY OF CORPORATE OFFICERS AND ORGANIZERS

(Continued from page 6)

pears that a few subscriptions for stock were taken and the purchase price received. Under the permit the proceeds were required to be held in escrow pending further order of the Corporation Commissioner, although the stock issued for cash was not required to be held in escrow. The evidence shows that no shares were issued and that the proceeds from the stock subscriptions were used to pay expenses. The purchase price was subsequently refunded to subscribers.

"The permit provided for the issue of promoters' shares to Mabrey, Johnson and Hann equal to the number of shares sold for cash, and that such shares should be held in escrow pending further order of the commissioner. It further provided that there should be no sale or transfer of promoters' 'shares, or any interest therein' without the written consent of the commissioner. The permit expired September 29, 1940. An application for renewal was denied on November 7, 1940, and no permit has been issued since. There was testimony that a permit could not be obtained while this action and two others for services were pending.

"The Corporate Securities Act is designed to secure a sound corporate structure, not only for the benefit of those to whom stock may be sold but also for creditors (*People vs. Kuder,* 98 Cal. App. 206, 216, 276, p. 578.) The provisions of the permit as to holding proceeds from the sale of stock in escrow, limiting the issue of promotion shares to the number of shares sold for cash, and prohibiting the transfer of promotion shares without the consent of the commissioner were designed to accomplish that purpose. The objects of the act would be circumvented if those who own the beneficial interests in a project could secure freedom from individual liability for themselves, and for those to whom they transfer interests in the venture, while at the same time avoiding compliance with the permit restrictions through the device of never issuing stock. While the corporation herein continued to exist as an entity and received a deed to the rink property and signed notes for loans, those managing the business cannot claim immunity from individual liability when the corporate structure over a period of almost twenty-one months had not been completed by the issue of stock. The transfers of 25 per cent interests in the project to Hollenbeck, Schwab and Streeter will not be viewed as stock in the corporation, using that term as applicable to an interest in the business, rather than as applying merely to the certificates, in view of the fact that under the permit there was no right to transfer stock to them.

> Defendants have at at all times maintained they each have 25 per cent interests in the business, which interests they could not have lawfully if they represent stock ownership in a corporation. In the circumstances agreements as to their interests will be regarded as transfers of interests in a business in the profits and losses of which they were to share as partners, and in which their liability is as partners.
>
> "The judgment is also against Ice Bowl, Inc., a corporation, which holds title to the property of the enterprise, including the rink. That property, obviously, is not placed beyond reach of creditors of the partnership because it is in the name of the corporation."

It is to be noted that the decision in the above case applies to a situation in which articles of incorporation had been filed, and an application for a permit to issue shares had been granted, but the shares were not issued. We wonder if the same rule would be applied if the shares had been issued before the filing of the suit. Let us also consider what the ruling would be if the application for the permit been filed within a month or two and the application been pressed, but the Commissioner had declined to issue the permit. Let us suppose that everything moved promptly, but the liability in question was incurred prior to the issuance of the permit by the Commissioner. The above decision apparently removes any doubt in a situation where the permit is applied for within a reasonable time and the permit to sell shares granted. In such a situation there is no individual liability. However, let us suppose (a) the application to issue stock is filed promptly, but the Commissioner of Corporations denies the application; (b) the application to sell shares is filed promptly, but the Commissioner of Corporations defers a decision for an extended period of time during which the liability would arise; or (c) the application is not filed promptly, but after liability has arisen it is filed and a permit granted. Another situation which could well arise as the result of the reasoning in the *Geisenhoff vs. Mabrey* case would be that the officers and directors were different individuals from the subscribers for the capital stock of the company. In such an event would the liability be attached to the officers, directors, the incorporators or the proposed shareholders? After cogitating on the above stated queries, we, as attorneys, in endeavoring to advise our clients on their rights and liabilities, should also consider the possibility that the doctrine of the *Geisenhoff vs. Mabrey* case may not be followed by the Supreme Court or the other District Courts of Appeal.

A recent decision which throws a dim light on one aspect of the situation is the case of *Holmberg vs. Marsden,* 39 Cal. 2d 593. In that case the plaintiff furnished $5,000 for a one-third interest in a business enterprise. He paid the money before a permit had been secured from the Commissioner. Judgment for the defendants was affirmed, the court placing its decision essentially on the theory that the plaintiff was one of the promoters of the business enterprise and that the defendants did not sell or offer to the plaintiff a stock interest in the corporation, but rather participated with him in organizing the enterprise. The court stated, at page 597, as follows:

> "Whether the three men, as among themselves, be termed partners, joint venturers, or copromoters of a corporation (see *Morris vs. Whittier Amusement Co.* (1932), 123 Cal. App. 121, 123 (10 P. 2d 1017); 6A Cal. Jur. 278; 13 Am. Jur. 265), it is obvious that the trial court was justified in concluding that they stood on an equal footing as entrepreneurs. It is significant that it was only after the financial outlook began to worsen that plaintiff sought to recover his contribution. There appears no more reason for defendants to reimburse plaintiff for his contribution to the venture than for plaintiff to reimburse defendants for theirs. At the time of trial defendants were still devoting their time and energies to operating the business for the benefit of all three owners, which included plaintiff."

Apparently the *Geisenhoff vs. Mabrey* decision does not apply if the services are performed or the money is invested by a promoter of the enterprise.

The reader's attention is called to Section 2200 of the Corporations Code, which provides that

> "An annual meeting of shareholders *shall* be held * * * in the morning on the first Tuesday of April in each year at the principal office of the corporation, unless a different time or place is provided in the by-laws."

The word "shall" is underlined because it appears to make the matter mandatory. While there does not appear to be anything in the Corporations Code pertaining to a penalty for not so doing, the mandatory word "shall" should have some persuasive influence. It is noted that most of the other provisions, except those that provide for the sending of notices, use the word "may" rather than "shall."

Georgia, Illinois and Wisconsin have statutes expressly imposing liability if business is begun before stock is subscribed. In

discussing this approach the members of your Committee took the position that legislation of this type was not a proper answer. The organizers are obviously accountable for doing more than obtaining stock subscriptions if they intend to escape individual liability.

It is the author's suggestion that the uncertainties should be removed by statutory enactment, which means amendments to the Corporations Code. The Corporations Committee of the Los Angeles Bar Association has not been able, as yet, to come up with recommendations satisfactory to it. My leaning is toward a requirement in the Corporations Code that personal liability shall be borne by the directors of a California Corporation if (a) a permit from the Commissioner of Corporations is not applied for within three months following the filing of Articles of Incorporation with the Secretary of State; or (b) a permit is finally denied; or (c) if certificates for shares are not issued within one month after the issuance of the permit.

My suggestion would eliminate responsible law offices furnishing initial "dummy" directors, but it would have the salutory effect of requiring management to cause shares to be issued within a reasonable time or of placing a known liability on the responsible directors of a corporation having no capital.

SURVEY OF ADMINISTRATION OF JUSTICE IN LOS ANGELES

(Continued from page 8)

and representative of the Los Angeles Bar Association; Mrs. Harold A. Fendler, past president of the League of Women Voters; John D. Fredericks, representing the Los Angeles Chamber of Commerce; James C. Greene, chairman of the Legislation and Administration of Jutice Section of Town Hall; C. R. Leslie, General Counsel and representative of the Merchants and Manufacturers Association; Patrick D. McGee, member of the California Legislature; Herman F. Selvin, a member of the Committee on Administration of Justice of the State Bar of California; and Leo Vie, secretary-treasurer, Building Trades Council, A. F. of L.

The entire project will ultimately report back to the Committee on Judicial Administration in Metropolitan Trial Courts, of the Section of Judicial Adminstration of the American Bar Association. That committee first initiated the program through an examination of the court system in Detriot. The survey there was conducted from 1948 to 1950 under the direction of the University of Michigan, and its results have been published by the University of Michigan press. The Los Angeles study is the second in the series. For comparative purposes, surveys in other metropolitan areas are now being planned.

Timing of the project for Los Angeles could hardly be more suitable. The State's 1951 reorganization of its inferior court system is now complete, and full attention of the judiciary, bar and public can be given to the problems peculiar to a metropolitan area. Further the expansion of the number of superior and municipal court judges by the 1953 legislature to a total of 120 for Los Angeles County has made more immediate the need to determine how effectively this sprawling machinery of justice is being utilized, and how it can better be geared together.

More fundamentally, the area's rapid growth is piling up social problems—crime, mental cases, traffic conditions, domestic relations, business rearrangements and others—that are not merely multiples of the social problems of either the rural communities in which most of the Anglo-American judicial system developed, nor even of the Los Angeles of a decade or more ago. Wholly new circumstances are being provoked. The judicial system must be ready to meet and resolve them.

In the survey's broadest sense, there is always need to reinforce

the capacity of our court system as a keystone of strength in the struggle to prove the superiority of free institutions. The crucial role of the judiciary even to the Soviets is clearly indicated in the statement of a Russian jurist, "A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court." But the substantial difference between the Soviet and American approaches to an effective judiciary is apparent in the comment of Justice Frankfurter on the same subject—it also underlines the importance of the pending study of the Los Angeles court system: "The incidence of law . . . is most significant at the lowest point of contact. The experience of the majority of men with law's relation to their small concerns is the most important generator of that confidence in law which is its ultimate sanction." Helping to assure that the organization and operation of the Los Angeles Court system can meet that demand is the ultimate objective of the present study.

TAXATION REMINDER

(Continued from page 11)

might not constitute a sale if the transfer is impaired by other provisions.

As to the other impairments of the transfer, such as the customary provisions bringing about a reversion to the transfer in case of a failure of the transferee to pay the compensation or to cure a breach, or in case of insolvency of the transferee or cessation of his business, these are regarded as conditions subsequent not impairing the transfer. The courts have also considered the effect upon the completeness of the transfer of a provision prohibiting the transferee from instituting infringement suits except in the name of the transferor. It has been held in one case, where a number of other facts indicated a license, that such an infringement suit provision together with such other facts were indicative of a license and not a sale. In another case, however, where other facts indicating a license were absent, the court held that such a provision respecting infringement suits did not render the transaction a license.

Accordingly, the following conclusion appears warranted: Where the transferor transfers the exclusive right to make, use, and sell for the remaining life of the patent, and throughout the United States or throughout a specified geographical area within the United States, and if the completeness of such transfer is not impaired by conditions precedent which render the purported sale

one in form only, but not in substance, then, irrespective of the method of compensation, the transaction is a sale. This conclusion may not be warrented either in the Second Circuit, *Bloch v. United States,* 200 F.(2d) 63; or in the Tenth Circuit, *Broderick v. Neale,* 201 F.(2d) 621. Notwithstanding a contrary attitude of the Bureau, and except for the uncertainty existing in the Second and Tenth Circuits, a heavy preponderance of the cases uphold a sale despite the fact that the compensation may be measured by a percentage of sales, production, or profits, where all other indicia of a sale are present.

Transferee's Problems

With respect to the transferee, the question at issue usually is whether the compensation paid by him for the patent rights constitutes the cost of acquiring an asset and, therefore, a capital expenditure which is not deductible as such, or whether such compensation constitutes the payment of royalties and, therefore, a deductible expense. If the transaction is determined to be a license, then the transferee's position is simple and clearly favorable, for the transferee will be able to deduct for each taxable year the amount paid by him during such year.

If, on the other hand, the transaction is determined to be a purchase, the transferee will still reap tax benefits by way of depreciation, for a patent is a depreciable asset. If the purchase price is a specified sum, whether payable in a lump or in installments, the transferee will be entitled to take a depreciaton deduction for the cost price, such depreciation, however, being spread over the remaining life of the patent.

If the compensation which is being paid by the transferee consists of a percentage of sales, production, or profits paid periodically and co-existent with the remaining life of the patent, then the transferee's tax position is even more favorable. The Tax Court has held that even in the case of purchase, where the compensation consists of such percentage payments, the depreciation deduction for each taxable year consists of the aggregate of the compensation paid during such year. *Associated Patentees, Inc.,* 4 Tax Court 979. Although the Bureau did not acquiesce in this decision (acquiescense is tantamount to instructions to Revenue Agents to follow a decision), nevertheless, the Tax Court's reasoning appears to be entirely logical and equitable, whereas the Bureau's contentions appear to be strained and illogical.